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No. 97-156

In The

Supreme Court of the United States

October Term, 1997

RANDON BRAGDON, D.M.D.,

Petitioner,

v.

SIDNEY ABBOTT, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR THE RESPONDENT SIDNEY ABBOTT

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QUESTIONS PRESENTED

1. Do all persons infected with the Human Immunodeficiency Virus have a disability under the Americans with Disabilities Act (ADA), either because they have a "physical impairment which substantially limits one or more major life activities," or because they are "regarded as" having such an impairment?

2. Is reproduction a major life activity within the meaning of the ADA?

3. Should courts defer to public health authorities or to non-specialist health care providers, such as a general dentist, in determining whether the risk of transmission of an infectious disease justifies discrimination against a patient under the ADA?

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STATEMENT OF THE CASE

This action was commenced in 1994 under the Americans with Disabilities Act (ADA) to enjoin petitioner Randon Bragdon, a dentist, from refusing to provide routine care to patients, including the respondent, Sidney Abbott, because they have tested positive for the human immunodeficiency virus (HIV). J.A. 143 (No. 11); *see also* J.A. 224, petitioner's written "Infectious Disease Policy."

Infectious, incurable, and virtually always fatal,[1] HIV poses a unique public health challenge. Caused by a retrovirus, HIV progressively destroys the immune system and is the leading cause of illness-related mortality of young adults aged 25-44. J.A. 55, ¶ 3.[2] Because of these unique attributes and the fear the virus engenders, people with HIV have been subject to social stigma and discrimination.[3]

With no vaccine or cure available or on the horizon, efforts to control the spread of the epidemic have relied upon public education and counselling about the modes of HIV transmission: sexual contact with exchange of

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[1] Defendant's Rule 19 Statement of Undisputed Material Facts at 7, ¶ 24, District Court Docket No. 57; J.A. 171.

[2] *See Update: Trends in AIDS Incidence, Deaths, and Prevalence – United States, 1996*, 46 Morbidity and Mortality Weekly Report No. 8, 165, 171 (1997). Acquired Immune Deficiency Syndrome (AIDS) is the advanced stage of HIV disease and is characterized by a range of "opportunistic infections" and malignancies which would generally not be life-threatening to a person with a normally functioning immune system. J.A. 87, ¶ 3.

[3] *See* Roger Steinbrook, M.D., *Battling HIV on Many Fronts*, 337 New England Journal of Medicine 11, 779-780 (1997) (observing that the "prejudices, fears and legacy of discrimination associated with the [HIV] infection have deep roots in society").

bodily fluids; childbirth or breast feeding; and direct exposure to blood or blood products. J.A. 55-56, ¶ 4.

In contrast to popular perception, however, HIV is difficult to transmit. According to petitioner's own expert, "HIV is a disease of low infectivity." J.A. 171 (p. 64). Although over one billion dental procedures have been performed by over 250,000 dental health care workers in the past fourteen years, and approximately 1,000,000 individuals in the United States are estimated to be infected with HIV, there has never been a documented case of HIV transmission from infected patient to dental health care worker, nor from infected patient to noninfected patient. J.A. 102, 106 (¶ 16).

The American Dental Association, the leading dental association in the United States, has had a policy since 1988 which states:

> Patients with HIV infection may be safely treated in private dental offices when appropriate infection control procedures are employed. Such infection control procedures provide protection for both patients and dental personnel.

Policy Statement on AIDS, HIV Infection and the Practice of Dentistry, American Dental Association (1988:457; 1991:591), J.A. 225.[4] *See also* Brief of the *Amicus Curiae* The American Dental Association, at 1 n.2.

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[4] In 1993, the United States Centers for Disease Control and Prevention (CDC) updated its guidelines on infection control precautions for preventing the transmission of HIV and other bloodborne pathogens in dental offices. First published in 1986, the CDC's guidelines, known as "universal precautions," instruct the practicing dentist how to implement proper procedures to treat all patients *safely*, including those with HIV. J.A. 102, 103-105 (¶¶ 3-6). Ms. Abbott presented testimony from Donald Wayne Marianos, D.D.S., M.P.H., then the CDC's Director of Division of Oral Health, that if dentists "follow universal precautions in their practice, persons with HIV or AIDS . . . can be safely treated in private dental offices." J.A. 105, ¶ 10. Dr. Marianos also testified that no additional infection control procedures are necessary to safely provide routine dental care to patients with HIV. *Id.* at ¶ 7.

On September 16, 1994, Sidney Abbott arrived at petitioner's office in Bangor, Maine for a previously-scheduled appointment. J.A. 145, No. 20. In response to written and verbal inquiries from petitioner about her medical history and HIV status, Ms. Abbott informed the petitioner that she had tested positive for HIV. J.A. 16, 27. Petitioner determined that Ms. Abbott had a cavity which required a filling. J.A. 156, No. 22. Although petitioner routinely fills cavities for his patients in his office, petitioner told Ms. Abbott that he was not willing to fill her cavity in his office because of her HIV status. J.A. 27. It is undisputed that when petitioner refused to fill Ms. Abbott's cavity, he did not consult or seek guidance from anyone, including any public health authority.[5]

Ms. Abbott filed a complaint in the United States District Court for the District of Maine in December, 1994; and the United States and the Maine Human Rights Commission intervened in support of Ms. Abbott's position. After discovery was completed, the District Court granted summary judgment in favor of Ms. Abbott and the two intervenors on all liability issues. *See Abbott v. Bragdon*, 912 F. Supp. 580 (D. Me. 1995) (Appendix to the Petition for Writ of Certiorari, 31a-65a).

The United States Court of Appeals for the First Circuit affirmed the grant of summary judgment in favor

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[5] Although petitioner represented to Ms. Abbott that he would treat her in a hospital setting if she paid the extra hospital charges (J.A. 144, No. 16; 156), he had not even applied for privileges to treat patients at any hospital. J.A. 16, 30-32. After Ms. Abbott filed her complaint against petitioner at the Maine Human Rights Commission on November 1, 1994, he applied for, but never received, privileges at a hospital two hours away from his office. J.A. 231.

of Ms. Abbott, ruling that Ms. Abbott is protected from discrimination under the ADA because HIV is a physical impairment which substantially limits the major life activity of reproduction. *Abbott v. Bragdon*, 107 F.3d 934, 939-942 (1st Cir. 1997) (1a, 7a-15a). The Court of Appeals also added a "final observation" that "Congress deemed HIV-infected individuals to be disabled under the ADA." *Id.* at 942 (15a).[6] In addition, the Court of Appeals determined that Dr. Bragdon did not present any "competent countervailing evidence" to rebut the consensus of public health authorities, including the American Dental Association and the CDC, that "affording routine dental care . . . to HIV-infected patients in an office environment does not pose a direct threat to the dentist's health." 107 F.3d at 945-948 (22a-30a). The Court of Appeals determined that "[e]ach piece of evidence is too speculative or tangential (or in some instances, both) to create a genuine issue of material fact." *Id.* at 947 (29a). The Court of Appeals reviewed the record for cumulative proof and was "satisfied that the evidentiary proffers canvassed above, insufficient in themselves, are likewise insufficient in combination to call into legitimate question the lower court's entry of summary judgment." *Id.* at 948 (29a).

SUMMARY OF ARGUMENT

1. The ADA's definition of disability applies to individuals who have a physical or mental impairment that

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[6] Contrary to petitioner's assertions [Petition at 7 n.6], Ms. Abbott also asserted in both the District Court and the Court of Appeals that she is covered under the "regarded as" prong of the statutory definition of disability. *See* Brief in First Circuit of Sidney Abbott at pp. 31-34, and Argument I.C., *infra*. The United States also made this same "regarded as" argument below. This argument provides independent grounds to affirm the decision of the Court of Appeals.

substantially limits a major life activity as well as individuals who have a "record of," or are "regarded as" having, such an impairment. 42 U.S.C. Section 12102(2). As this Court noted in *School Board of Nassau County v. Arline*, 480 U.S. 273, 280 n.5, 283 (1987), this definition was intended to encompass more than "traditional handicaps" and to protect individuals who were substantially limited due to the negative attitudes of others to their impairment.

2. There is no dispute here that HIV is a physical impairment. The statutory term "physical impairment" refers to a physiological condition which worsens or diminishes one's physiological state. Upon infection, HIV creates abnormalities and deficiencies in the blood and immune systems and renders bodily fluids infectious and diminished in quality.

3. The text and legislative history of the first prong of the ADA's definition of disability show that it was intended to be broad and cover a wide range of serious health conditions which do not comport with the colloquial understanding of the term "disability."

4. Procreation, parenting, and intimate sexual relations are major life activities within the meaning of the ADA. Procreation is "fundamental to the very existence and survival of the race," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and, along with parenting, has long been recognized by this Court as deserving of constitutional protection. Intimate sexual relations is also among the most important of all human activities, fundamental to reproduction, intimacy, and social ordering. The plain language of the ADA, as well as its legislative history, demonstrates that these activities are major life activities.

5. HIV always substantially limits the major life activities of procreation, parenting, and sexual relations. As a fatal, infectious disease, HIV changes substantially the risks and choices associated with reproduction for all who are infected. Everyone who is infected bears the risk of infecting any child he or she may conceive, as well as

his or her sexual partner. In addition, because the disease is fatal, one's ability to raise a child is significantly limited.

6. By setting an unexpected and premature endpoint on life, a fatal disease, such as HIV, limits a wide array of major life activities (including those activities which require thinking about the future) and inevitably changes the experience of life itself. Individuals with HIV are also substantially limited because they require lifelong and complex medical care.

7. Nothing in the text of the ADA requires that every individual make a particularized showing of substantial limitation. To the contrary, many of the provisions of the ADA make little sense unless some impairments are always treated as disabilities. The clear legislative goal of prohibiting discrimination on the basis of HIV status, a goal which the Surgeon General testified was essential to encouraging individuals to be tested, could not be realized if there was uncertainty as to whether every individual with HIV was protected against discrimination.

8. The legislative history of the ADA also shows unequivocally that Congress believed that HIV was universally a disability. This belief is reflected in committee reports as well as in floor statements by both the supporters and opponents of the act. Moreover, pre-ADA case law and administrative interpretations under the Rehabilitation Act establish that there was no doubt when the ADA was enacted that HIV, whether symptomatic or asymptomatic, was a disability. When, as here, Congress re-adopts sections of a prior law, Congress is presumed to have incorporated the prior judicial interpretations of the earlier law. *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978). That presumption is especially apt here because the ADA specifically states that it shall be interpreted in light of the Rehabilitation Act and its history. 42 U.S.C. Sec. 12201(a).

9. Even if all people with HIV are not disabled under the first prong of the definition of disability, Ms. Abbott made an individualized showing that she is substantially limited in the major life activity of reproduction and is therefore a person with a disability under the ADA.

10. Individuals with HIV infection are also covered under the third prong of the definition of disability. In *Arline*, this Court explained that the third prong applies when an individual is substantially limited due to myths, fears, and stereotypes about an impairment. 480 U.S. at 282-284. HIV, an infectious, fatal disease, is the quintessential stigmatic condition. Individuals with HIV have faced discrimination in all walks of life, but particularly with respect to access to health and dental care. As a result, individuals with HIV, such as Ms. Abbott, have a disability under the third prong.

11. In determining whether the risk of transmission of HIV constitutes a "direct threat to the health or safety of others," courts should apply an objective test and defer to public health authorities, not to the individual views of public accommodations.

ARGUMENT

I. EVERY PERSON INFECTED WITH HIV FALLS WITHIN THE ADA'S DEFINITION OF DISABILITY.

A. INTRODUCTION TO COVERAGE OF HIV UNDER FEDERAL DISABILITY DISCRIMINATION LAW.

The term "disability" in the ADA means, "with respect to an individual":

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such impairment;

(C) being regarded as having such an impairment.

42 U.S.C. Section 12102(2).

This definition was not a new creation. It first appeared in the Rehabilitation Act Amendments of 1974, Pub L. No. 93-516, Section 111, 88 Stat. 1617, 1619 (1974), codified at 29 U.S.C. Section 706(8)(B). In those amendments, Congress discarded a narrow, technical definition which focused exclusively on vocational limitations[7] in favor of a three-pronged definition of "handicapped individual." The first prong of the amended definition contained broad language flexible enough to reach a wide range of health problems (i.e., "physical or mental impairment which substantially limits . . . major life activities"). *See* 88 Stat. 1617, 1619 (1974). In addition, because Congress was concerned about discrimination arising from stereotypes and ignorance about physical and mental impairments, Congress added the second and third prongs which include persons with a "record of," or who are "regarded as" having, an impairment. *Id.*; *see also*, S. Rep. No. 1297, 93rd Cong., 1st Sess. 16, 37-38, 50 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6388-91, 6413-14.

In *Arline*, 480 U.S. at 280 n.5, this Court recognized that the amended definition was "broad" and encompassed more than "traditional handicaps." This Court also explained that Congress intended to prohibit discrimination against persons who may not have any diminished physical capability, but who are substantially

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[7] The Rehabilitation Act of 1973 defined "handicapped individual" to mean: "any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services." Pub. L. No. 93-112, Section 7(6), 87 Stat. 355, 361 (1973).

limited solely because of the negative attitudes of others towards an impairment. *Id.* at 282-284.

In 1990, Congress enacted the ADA to extend the prohibition against discrimination on the basis of disability to private employers and public accommodations.[8] In so doir.g, Congress re-enacted the Rehabilitation Act's definition of "handicap." A careful and complete reading of the statute and its legislative history demonstrates that under that definition some physical impairments are always disabilities because they have universal consequences. In contrast, other conditions which present a wide spectrum of consequences may constitute a disability for some individuals, but not for others. *See* Argument I.B.2.vi, *infra*.

By the time that Congress enacted the ADA, it understood that HIV – an incurable, fatal and infectious disease – was among those conditions which are universally disabling. When Congress used the identical "non-traditional" definition of "handicap" in the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, Section 6, 102 Stat. 1619, 1620 (1988), Congress understood that HIV fit squarely within the definition of "handicap." *See* H. Rep. No. 711, 100th Cong., 2d Sess. 18 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2178-2179. Also in 1988, the Department of Justice construed the Rehabilitation Act to include persons with symptomatic and asymptomatic HIV infection within the protected class.[9] An identical conclusion was reached by every reported federal court

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[8] Pub. L. No. 101-336, 104 Stat. 327 (1990), codified at 42 U.S.C. Section 12101 *et seq.*

[9] *See* Memorandum of Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, to Arthur B. Culvahouse, Jr., Counsel to the President (September 27, 1988) ("DOJ Memorandum"), reprinted in *Americans with Disabilities Act of 1989; Hearings Before the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 338-368 (1989).

decision under the Rehabilitation Act and the Fair Housing Act prior to the enactment of the ADA in 1990.[10] *See* Argument Section I.B.2.viii, *infra*.

The problem of pervasive discrimination against people with HIV was a keen interest of the ADA's drafters. Congress was concerned not only because discrimination harmed its victims, but also because it undermined the nation's public health efforts to limit the spread of the epidemic.[11] As the President's Commission on the HIV

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[10] In addition, virtually every court since the passage of the ADA has found that HIV is a disability. *See, e.g., Abbott*, 107 F.3d at 939-942 (6a-15a) (1st Cir. 1997); *Gates v. Rowland*, 39 F.3d 1439, 1445 (9th Cir. 1994); *Harris v. Thigpen*, 941 F.2d 1495, 1524 (11th Cir. 1991); *Severino v. North Fort Myers Fire Control District*, 935 F.2d 1179, 1181 (11th Cir. 1991); *Doe v. Garrett*, 903 F.2d 1455, 1458 (11th Cir. 1990); *Hernandez v. Prudential Insurance Company of America*, 977 F. Supp. 1160, 1163-1165 (M.D. Fla. 1997); *Rivera v. Heyman*, 7 A.D. Cases 813, 1997 WL 620837 at *3 (S.D.N.Y. 1997); *Anderson v. Gus Mayer Boston Store of Delaware*, 924 F. Supp. 763, 774-777 (E.D. Tex. 1996); *D.B. v. Bloom*, 896 F. Supp. 166, 170 (D.N.J. 1995); *Sharrow v. Bailey*, 910 F. Supp. 187, 191 (M.D. Pa. 1995); *Austin v. Pennsylvania Department of Corrections*, 876 F. Supp. 1437, 1465 (E.D. Pa. 1995); *Howe v. Hull*, 873 F. Supp. 72, 78 (N.D. Ohio 1994); *United States v. Morvant*, 843 F. Supp. 1092, 1093-94 (E.D. La. 1994); *Robinson v. Henry Ford Health Systems*, 892 F. Supp. 176, 179 (E.D. Mich. 1994), *aff'd mem.*, 86 F.3d 1156 (6th Cir. 1996); *Doe v. Kohn, Nast & Graf*, 862 F. Supp. 1310, 1319-1322 (E.D.Pa. 1994); *Support Ministries for Persons With AIDS, Inc. v. Village of Waterford*, 808 F. Supp. 120, 129-132 (N.D.N.Y. 1992); *Stewart B. McKinney Foundation, Inc. v. Town Plan and Zoning Commission of Fairfield*, 790 F. Supp. 1197, 1209 (D. Conn. 1992); *Doe v. District of Columbia*, 796 F. Supp. 559, 567 n.10 (D.D.C. 1992); *Casey v. Lewis*, 773 F. Supp. 1365, 1370 (D. Az. 1991).

[11] *See* S. Rep. No. 116, 101st Cong., 1st Sess. 8, 19 (1989) (referred to hereinafter as "S. Rep."); H. Rep. No. 485, Part 2, 101st Cong., 2d Sess., 31, 48 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303 (referred to hereinafter as "H. Rep. – 2"); H. Rep. No. 485, Part 3, 101st Cong., 2d Sess. 25 n.7 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445 (referred to hereinafter as "H. Rep. – 3").

Epidemic stated in a report whose conclusions were adopted by Congress:

> [A]s long as discrimination occurs, and no strong national policy with rapid and effective remedies against discrimination is established, individuals who are infected with HIV will be reluctant to come forward for testing, counseling, and care. This fear of potential discrimination . . . will undermine our efforts to contain the HIV epidemic and will leave HIV-infected individuals isolated and alone.

S. Rep. at 8; H. Rep. – 2 at 31.

In order to prevent discrimination from endangering the public health, Congress incorporated into the ADA a pre-existing definition of disability that by its plain language, its previously established legal meaning, and its clear legislative history applies to all persons with HIV (symptomatic or asymptomatic). *See* S. Rep. at 22; H. Rep – 2 at 52; H. Rep. – 3 at 28 n.18.[12]

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[12] Faced with the clear record that everyone in Congress understood that HIV infection is always a disability (*see* Argument, Sec. I.B.2.vii, *infra*), petitioner attempts to trump up an ambiguity in the legislative history where there is none. Petitioner asserts that the implementing regulations for the Fair Housing Act Amendments of 1988 include asymptomatic or symptomatic HIV in the illustrative list of "physical impairments," but do not expressly define HIV as a handicap. Since the Senate Report endorses the analysis of the term "handicap" in the Fair Housing Act regulations, petitioner reasons that the Senate must have believed that HIV infection was an impairment, but not always a disability. Petitioner's Brief at 19-21. Petitioner's claim is misguided. While the regulations under the Fair Housing Act, the Rehabilitation Act and the Americans with Disabilities Act include illustrative examples of physical impairments, *none* identifies any

B. ALL PEOPLE WITH HIV INFECTION HAVE A PHYSICAL IMPAIRMENT WHICH SUBSTANTIALLY LIMITS MAJOR ONE OR MORE LIFE ACTIVITIES.

1. HIV Infection is Always a Physical Impairment.[13]

The ADA does not define the term "physical impairment." However, the natural and ordinary meaning of the word "impair" is "to make worse[;] diminish in quality, value, excellence, or strength[;] do harm to[;] damage, lessen . . . [;] deteriorate." *Webster's Third New International Dictionary of the English Language* (1981). The term "physical impairment" therefore must refer to a physiological condition which worsens or diminishes one's physiological state. This textual understanding is supported by the pre-ADA regulatory analysis of the term "physical impairment" which Congress explicitly adopted.[14]

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disabilities. Therefore, the inference which the petitioner seeks to draw from the regulatory silence does not follow. Moreover, the commentary to the regulations makes clear that HIV was added to the illustrative list of "physical impairments" because "the legislative history of the Act contains numerous statements that HIV infected individuals are covered by the Act." 54 Fed. Reg. 3232, 3245 (Jan. 23, 1989).

[13] Petitioner did not challenge in either the District Court or the Court of Appeals that HIV infection is a physical impairment. This issue therefore is not squarely presented for review in this case. Nevertheless, since a plurality of the Fourth Circuit recently decided that HIV was not a physical impairment, *see Runnebaum v. NationsBank of Maryland, N.A.*, 123 F.3d 156 (4th Cir. 1997) (plurality opinion), we briefly address this issue so that it may be put to rest.

[14] The Department of Health, Education and Welfare regulations defined the term "physical impairment" to mean: "[A]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems . . . [including] the hemic and lymphatic

Based on undisputed medical evidence in the record, HIV fits easily within the plain meaning of "physical impairment." HIV infection is an incurable disease which, even before the onset of outward signs of illness, diminishes bodily functions in two ways. First, HIV creates abnormalities and deficiencies in the blood and immune systems. J.A. 55, ¶ 3. When HIV enters the body, it multiplies and has an immediate and destructive effect on the blood (hemic) and lymphatic systems, which are critical to the body's defense against infection. *Id.* Thus, even before the onset of overt symptoms, HIV infection causes a progressive destruction of the body's blood, lymphatic and immune systems, diminishing the body's capacity to fight infections. *Id.*[15] Second, the bodily fluids of an HIV-positive person, including blood, semen, and breast milk, are infectious. *Id.* at ¶¶ 3-4. In the most basic sense, then, the bodily fluids of a person with HIV are abnormal, damaged, and diminished in quality.[16]

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systems." 45 C.F.R. Section 84.3(j)(2)(i). The ADA expressly adopts the analysis of agency regulations under the Rehabilitation Act. *See* 42 U.S.C. Section 12201(a); *see also* S. Rep. at 50.

[15] Based on this undisputed medical evidence, a person with HIV or AIDS is not merely a "carrier" of a disease. Nor is HIV infection a mere predictor of future illness. HIV is a virus which upon infection begins destroying cells critical to the immune system. Thus, the actual impairment is immediate. Even in individuals who remain without overt symptoms for several years, HIV infection causes an abnormal and weakened immune system. J.A. 55, ¶ 3. *See also* Brief of *Amici Curiae* Infectious Disease Society of America, *et al.*, Section I (hereinafter, the "IDSA Brief").

[16] The ADA regulations and legislative history provide further support that "HIV-positive status simpliciter, whether symptomatic or asymptomatic, comprises a physical impairment." 107 F.3d at 939 (6a). *See* 28 C.F.R. Section 36.104; S. Rep. at 22, H. Rep. – 2 at 51; H. Rep. – 3 at 28 (specifying that "infection with the human immunodeficiency virus" is an impairment).

It is therefore unsurprising that until 1997, no court decision had seriously questioned that HIV infection simpliciter is a physical impairment under federal disability discrimination law.[17] The first case to raise a doubt was *Runnebaum*. The *Runnebaum* plurality is clearly wrong and its reasoning should be clearly rejected by this Court. The statutory language, legislative history, and regulations all dictate that, contrary to the *Runnebaum* plurality's reasoning, the determination of "impairment" is distinct from the inquiry about how the impairment limits life activities. In addition, *Runnebaum* mistakenly equates "impairment" with "visible symptom." Nothing in the text or legislative history supports a requirement that an impairment be visible or outwardly manifest. Many conditions, from epilepsy to lung cancer, may not be visible to others, but indisputably are impairments.

2. HIV Substantially Limits One or More Major Life Activities For All Persons Infected.

i. Congress Deliberately Chose the Broad, Expansive Phrase "Major Life Activity" to Include Health Conditions Which Have the Effect of Making Life More Difficult.

The first prong of the ADA's definition of "disability" includes impairments which "substantially limit one or more major life activities." 42 U.S.C. Section 12102(2)(a). In

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[17] Prior to 1997, every federal case easily concluded that HIV is a physical impairment. *See, e.g., Gates v. Rowland*, 39 F.3d at 1445; *Leckelt v. Board of Commissioners of Hospital District No. 1*, 909 F.2d 820, 825 (5th Cir. 1990); *Austin v. Pennsylvania Department of Corrections*, 876 F. Supp. at 1465; *Doe v. Kohn, Nast & Graf*, 862 F. Supp. at 1319-1320; *Doe v. District of Columbia*, 796 F. Supp. at 566; *Cain v. Hyatt*, 734 F. Supp. 671, 677-678 (E.D. Pa. 1990); *Baxter v. City of Belleville*, 720 F. Supp. 720, 725 (S.D. Ill. 1989).

construing this definition, this Court looks first to the statute's language and context. *See Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993).

The plain language of the first prong reflects Congress' rejection of a narrow, technical definition in favor of a broad, flexible concept designed to facilitate the statutory goal of enabling "forty-three million Americans" to live full, independent and economically self-sufficient lives. *See* 42 U.S.C. Section 12101(a)(1) and (8). The language is broad and inclusive because Congress wanted all people with serious health conditions to have the opportunity to work, be self-reliant and have access to public places and services. *See* 42 U.S.C. Section 12101(a)(9) ("discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and . . . costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity").

To achieve these goals, the ADA includes more than conditions which are so debilitating as to be incompatible with work and the enjoyment of public accommodations.[18] Indeed, it was the precise goal of the ADA to ensure that individuals who experience some health-based limitations, but can work and be self-supporting, be protected from discrimination so that they can work and be self-sufficient. If the ADA did not cover such people, those who could work might be unable to do so

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[18] In contrast, Congress defined the term "disability" in the Social Security Act as: "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. Section 1382c(a)(3)(A).

solely due to discrimination.[19] Thus to promote independence, the statutory text covers a wide range of serious health conditions which do not necessarily comport with the colloquial understanding of the term disability. At the same time, the definition of disability would exclude trivial or short-lived conditions such as influenza or a broken ankle. *See* H. Rep. – 2 at 52; S. Rep. at 23.

The phrase "major life activities" facilitates these statutory goals because, as the Court of Appeals correctly noted, the "plain meaning of the word 'major' denotes comparative importance" or "significance" and the term "life" is "notable for its breadth." 107 F.3d at 939-940 (8a-9a). *See also Doe v. Kohn, Nast & Graf, P.C.*, 862 F. Supp. at 1320 (finding that HIV is a disability, and noting that the "term 'major life activities' . . . encompasses a lot [and includes] the various major activities embraced within the full scope of one's life"). The phrase "life activities" encompasses a wide, expansive range and array of tasks, functions and pursuits which most people would engage in. *See* S. Rep. at 23; H. Rep. – 2 at 52 (describing major life activities as "important life activities"). Congress easily could have chosen to use (but did not) a narrower,

[19] Importantly, falling within the statutory class is of no relevance unless there is discrimination due to the health condition at issue. Moreover, the breadth of the definition is balanced by the limiting or restricting principles in the substantive discrimination provisions. For example, under Title I, an individual with a disability cannot prevail on an ADA claim unless he or she is a "qualified individual with a disability." 42 U.S.C. Sections 12111(8) and 12112(a). Similarly, individuals with a disability are entitled to a "reasonable accommodation" only when it does not impose an undue hardship, 42 U.S.C. Section 12112(b)(5)(A), or fundamental alteration of services. 42 U.S.C. Section 12182(b)(2)(A)(ii). Even blatant, invidious discrimination is permitted if the disability creates a "direct threat to the health or safety of others." 42 U.S.C. Sections 12113(b) and 12182(b)(3).

more restrictive phrase such as "essential life activities" or "daily life activities." The phrase "life activities" is thus broad enough to cover both the activities listed in the regulations[20] as well as some other important and basic life activities including procreation, parenting, intimate sexual relations, decision making about such matters, as well as maintaining health and living itself.

ii. Procreation, Parenting, and Intimate Sexual Relations are Major Life Activities.

Procreation, the life activity which creates *life* itself, is plainly a "major life activity." *See* 107 F.3d at 939 (8a) ("reproduction, which is both the source of all life and one of life's most important activities, easily qualifies [as a major life activity]"); *Pacourek v. Inland Steel Co., Inc.*, 916 F. Supp. 797, 804 (N.D.Ill. 1996). This Court has long recognized the importance of procreation, noting that it is "fundamental to the very existence and survival of the race." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Accordingly, an individual's interest in deciding whether or not to conceive and raise children and in actually doing so is a fundamental liberty interest, deserving of

[20] On its face, the Title III regulation defining "major life activities" is illustrative and open-ended. *See* 28 C.F.R. Section 36.104 ("major life activities means functions *such as* caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working") (emphasis supplied); *see also*, 107 F.3d at 940 (8a) (noting that the regulation "clearly . . . indicates [that the] enumeration is not meant to be exclusive . . . "). The import of this non-exhaustive list is that the statutory phrase is too broad and flexible to make a complete enumeration possible.

constitutional protection.[21] *See, e.g., Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 849 (1992) (fundamental liberty to make decisions about family and parenthood); *Carey v. Population Services International*, 431 U.S. 678, 684 (1977) ("The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices."); *Stanley v. Illinois*, 405 U.S. 645, 650 (1972) (unwed father's due process right to companionship, care and custody of his children). Perforce this interest falls within the broader category of a "major life activity."[22]

In addition, it defies common sense to argue that intimate sexual relations is not an activity of the utmost importance. Sexual relations is one of the most basic activities which humans engage in and, for the most part, is the *sine qua non* for reproduction. Decisions about sexual relations have always been fundamental to social ordering and lie at the heart of human relationships,

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[21] Numerous other courts have correctly ruled that reproduction is a major life activity. *See Bielicki v. City of Chicago*, 1997 U.S. Dist. LEXIS 6880 (N.D. Ill. 1997) at *8; *Hernandez v. Prudential Life Insurance Company of America*, 977 F. Supp. at 1163; *Rivera v. Heyman*, 7 A.D. Cases 813, 1997 WL 620837 at *3; *Anderson v. Gus Mayer Boston Store of Delaware*, 924 F. Supp. at 777 n.37; *Pacourek v. Inland Steel Co., Inc.*, 916 F. Supp. at 804; *Austin v. Pennsylvania Department of Corrections*, 876 F. Supp. at 1465; *Erickson v. Bd. of Governors of State Colleges*, 911 F. Supp. 316 (N.D. Ill. 1995); *Doe v. Kohn, Nast & Graf*, 862 F. Supp. at 1320-21; *Cain v. Hyatt*, 734 F. Supp. 671, 678 (E.D. Pa. 1990); *Thomas v. Atascadero Unified School District*, 662 F. Supp. 376, 379 (C.D. Cal. 1986).

[22] Clearly many of the major life activities recognized by the statutory term are not entitled to any heightened protection under the Due Process Clause. The point, however, is that if an activity is constitutionally protected, it stands to follow that it falls within the broader and less rigorous category of "major life activities."

intimacy, and socialization. Moreover, the inclusion of intimate sexual relations within the category of "major life activity" is consistent with the legislative history in which Congress specified that the term "major life activities" includes procreation and intimate sexual relations. H. Rep. – 2 at 52.

Petitioner never addresses the statutory language, which this Court has observed is not limited to "traditional handicaps." *Arline*, 480 U.S. at 280 n.5. Instead, he claims that neither procreation nor sexual relations are major life activities because the ADA regulates public life, not private matters.[23] Petitioner's Brief at 27-31. This position is without merit for two reasons. First, the text of the ADA makes clear that the question of who has a disability, and is therefore simply within the protected class, is distinct from the issue of where discrimination is prohibited. Second, petitioner's argument is predicated on the assumption that a covered entity must be able to see an individual's substantial limitation in order for that individual to have a disability. This is plainly false. Many conditions which will often be substantially limiting are invisible. For example, epilepsy, pancreatic cancer or bipolar disorder may not be visible to others yet under the statute, an employer is restricted in its ability to inquire

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[23] Petitioner attempts to frighten this Court with the specter of millions of individuals with infertility seeking protection under the act if reproduction is a "major life activity." *See* Petition at 9. But, in fact, even if some forms of infertility constitute disabilities, individuals with that condition would not have unlimited rights. It is worth repeating that the act contains numerous substantive limitations, *see* n.19, *supra*, such as the requirement that accommodations be reasonable and not cause an undue burden. Moreover, the provision of insurance benefits, especially relevant to infertility, is separately treated by the ADA's safeharbor provision. 42 U.S.C. Section 12202(c).

about the existence of these conditions. *See* 42 U.S.C. Section 12112(d)(4)(A) (prohibiting certain examinations and inquiries as to whether an individual has a disability "or as to the nature or severity of the disability").

Petitioner also contends that reproduction cannot be a major life activity either because it is a lifestyle choice or because it is not necessarily engaged in with frequency, citing *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677 (9th Cir. 1996) and *Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995), *aff'd mem.*, 79 F.3d 1143 (5th Cir. 1996).

These arguments are flawed and should be rejected. First, the starting place for statutory interpretation is the language of the statute followed by its legislative history. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 896 (1984). The two cases relied upon by petitioner completely disregard both. Instead, they focus on a narrow reading of one section of the regulations. As the Court of Appeals held in this case, *Krauel* treated the list of activities in the regulation as exclusive, not illustrative, contrary to the regulation's plain language. 107 F.3d at 940 (8a).[24] In addition, there is no evidence in the statute's text or the regulations that "Congress intended either frequency or universality to operate as a restriction on the definition of 'major life activities.' " 107 F.3d at 940 (10a).[25] To confine

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[24] Indeed, the ADA Title III regulation supports the conclusion that reproduction is a major life activity. The regulations define the term "physical impairment" to include physiological disorders affecting the reproductive system. *See* 28 C.F.R. Section 36.104. This indicates that "[the ADA's] drafters considered reproduction to be a major life activity – otherwise, including reproductive disorders among the regulation's roster of physical impairments would not have made much sense." 107 F.3d at 940 (9a), citing *Pacourek*, 916 F. Supp. at 801-802.

[25] The Court of Appeals observed that the activities "explicitly enumerated in the regulation are not wholly

a major life activity only to those activities which occur every day or are necessary to exist ignores the statutory language and history as well as the significance of procreation and intimate sexual relations to life.

iii. In Order to Limit Substantially a Major Life Activity, a Physical Impairment Must Restrict, Confine, or Set a Boundary On, But Need Not Preclude, the Activity.

Under the first prong of the definition of disability, a physical impairment constitutes a disability if it substantially limits a major life activity. The plain meaning of "limits" is to "restrict," "confine within limits, to set bounds to." VIII *Oxford English Dictionary* 965 (1989). *See also, American Heritage Dictionary* 1044 (1992) ("to confine or restrict within a boundary or bounds"). Congress' choice of the words "substantially limits" rejects any requirement that an individual absolutely cannot or chooses not to engage in a particular life activity. *See also*, 28 C.F.R. Part 36, App. B Section 36.104 (a person is substantially limit[ed] in any activity if, "in comparison to most people," he or she is "restricted as to the conditions, manner or duration under which it can be performed"); S. Rep. at 23; H. Rep. – 2 at 52 ("A person is considered an individual with a disability for purposes of the first prong of the definition when an individual's important life activities are restricted as to the conditions, manner or duration under which they can be performed in comparison to most people.").

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characterized by frequency or universality." 107 F.3d at 940 (11a) (noting that work, for example, is not universal as "the lives of some of the very rich and some of the very poor demonstrate.").

This Court in *Arline* recognized that the "substantial limitation" requirement was not rigorous. The *Arline* Court quickly and easily determined that the plaintiff was substantially limited in a major life activity simply because she had been hospitalized on one occasion, without need for any further inquiry. *See* 480 U.S. at 281.[26]

iv. HIV Substantially Limits the Major Life Activities of Procreation, Parenting, and Intimate Sexual Relations.

Because of HIV's infectiousness, procreation, parenting, and intimate sexual relations are the most obvious, but certainly not the only, life activities which are substantially limited by HIV infection. Procreation is substantially limited because an HIV-positive man and an HIV-positive woman risk infecting both their sexual partners as well as any children they conceive. An HIV-positive mother can transmit HIV to a child during breast feeding. Even if a child is born uninfected, the fatal nature of HIV infection means that a parent is unlikely to live long enough to raise and nurture the child to adulthood. Obviously, this impacts on an individual's decision as to whether or not to have a child and, if so, how to raise the child. As the Court of Appeals noted, and no party seriously disputed, "HIV-positive status has a profound impact upon [the] ability to engage in intimate sexual activity, gestation, giving birth, childrearing, and nurturing familial relations." 107 F.3d at 939 (7a).

In addition, all people with HIV infection, even if they practice "safer sex," can infect others with a life-threatening disease if there is an exchange of bodily

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[26] Indeed, if an activity had to be absolutely precluded in order to be substantially limited, no one could ever be found to have a substantial limitation of the major life activity of breathing.

fluids during sexual activity. Certainly the risk that a deadly disease will result from an activity inherently limits, restricts, and sets boundaries on the activity. The fear and concern of others about the infectiousness of HIV, and the fatal nature of the disease, also make intimate sexual relations and procreation more difficult for people who are HIV-infected.

HIV's limitation on procreation and intimate sexual relations is universal and does not depend on the particular intentions which any individual may hold at a particular point in time. People commonly change their plans and intentions about procreation and intimate sexual relations throughout the course of their lives. Therefore, even if an HIV-infected individual believes today that he or she would refrain from these activities, even in the absence of HIV infection, he or she is still substantially limited because future options are restricted. Such an individual never has the opportunity to change his or her intentions and engage in procreation and intimate sexual relations without the dangers of infectiousness and fatality. As such, HIV permanently forecloses options to engage in some of the most fundamental and important life activities in the same way that uninfected persons can. Likewise, even if an individual chooses, despite the infection, to engage in those activities, he or she is still substantially limited because he or she is facing risks and limitations not experienced by those who are uninfected.

The petitioner asserts that people with HIV cannot be limited in procreation or sexual relations because HIV does not make those activities physically impossible. Petitioner's Brief at 39-40. The ADA's text, however, requires only a physical or mental impairment "that substantially limits one or more . . . major life activities." Neither the text, the legislative history nor the regulations require that the impairment preclude the activity. They only require that *but for* the impairment, the individual would

not be substantially limited.[27] In the case of HIV, *all* individuals are so limited with respect to the major life activities of procreation, parenting and intimate sexual relations.

v. A Fatal Disease Such as HIV Necessarily Limits a Wide Array of Major Life Activities, Including Caring For One's Self.

As long as HIV is an infectious, incurable, universally fatal disease, it inevitably limits substantially an array of major life activities. By setting an unexpected and premature endpoint on one's life, a fatal illness necessarily limits that life, and any life activities which require thinking about the future. Decisions about such matters as family, working, learning or education, even whether to buy a home, are restricted by the shortened nature of life itself. Thus, even in the implausible event that an individual with a fatal illness experienced neither any physical or psychological effect from the illness, simply by shortening life, the physical impairment would substantially limit many major life activities.

But in reality, a fatal illness does more than merely set an endpoint on an individual's life. A fatal illness inevitably changes the experience of life itself. *See* Brief of

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[27] The ADA covers persons whose lives are substantially limited by physical or mental impairments, not by economic or environmental factors. Petitioner divorces the "substantial limitation" of an activity from the link to the "physical impairment" by claiming that poor women whose babies may live "short and miserable lives" could be covered by the ADA. Petitioner's Brief at 41. This is patently absurd. Similarly, post-menopausal women or individuals who choose to limit their fertility through family planning are not limited by a physical impairment any more than a person with an inheritance who chooses not to work is covered by the ADA because of a "substantial limitation" to working.

Amicus Curiae American Medical Association, Med. Background, Section B.II. Although "[d]eath will be different for each of us," *Washington v. Glucksburg*, ___ U.S. ___, 117 S. Ct. 2302, 2303 (1997) (O'Connor, J., concurring), the experience of facing death is never trivial. Individuals with a fatal illness commonly experience a wide range of psychological reactions, that may include denial, isolation, anger and depression. Elisabeth Kubler-Ross, *On Death and Dying* (1969), *passim*.[28] While the particular reactions may vary among individuals, it defies credulity to deny that the shadow of premature mortality significantly changes life, thereby necessarily limiting life activities.[29] To rule that people with universally fatal diseases are not protected from discrimination until they are significantly debilitated would undermine the statutory goal of ensuring that people with serious health conditions have equal opportunity.

The Title III regulations also recognize that "caring for one's self" is a major life activity. 28 C.F.R. 36.104. "Caring for one's self" necessarily includes the ability to care for one's health and, in some circumstances, to obtain the health care necessary to do so. *See Hernandez*, 977 F. Supp. at 1165 ("caring for one's self" includes need for continued medical care). In *Arline*, this Court found that the plaintiff faced a substantial limitation of a major

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[28] *See also*, Andrew E. Slaby, M.D., Ph.D., M.P.H., Arvin S. Glicksman, M.D., *Adapting to Life-Threatening Illness*, Praeger Special Studies, 1985 at 8 ("The awful awareness of the fragility of the fabric of life creates, in all but the most insensitive, a crisis – a turning point. The abstract assumption that we will not live forever becomes a personal reality for those with life-threatening illnesses and for those around them.").

[29] The fact that HIV progresses slowly in a very small number of cases does not alter the impact of the anticipated fatality of HIV since no person can possibly know whether he or she will be among those rare cases.

life activity simply because she had required hospitalization. 480 U.S. at 281. Since no other major life activity was cited, the clear implication is that by virtue of the fact that Arline required extensive medical care to become healthy, she was limited in the major life activities of caring for herself and maintaining health.

HIV infection, like tuberculosis, necessarily requires ongoing medical monitoring and complex, burdensome medical treatment, except that HIV, unlike tuberculosis, requires life-long treatment. The standard treatment for HIV disease involves multiple combinations of toxic antiviral drugs and entails intensive, difficult treatment regimens. *See* IDSA Brief, Section II.A. As an editorial about HIV treatment in the prestigious medical journal The Lancet recently noted:

> It is difficult to adhere to anti-retroviral treatment regimens. Many pills have to be taken at awkward times that interfere with normal eating patterns. So many patients find it impossible to comply with such a regimen for the rest of their lives and as a result multiple drug resistance develops.

See Paul A. Volberding, *Protease Inhibitors Vindicated*, The Lancet, vol. 350 (suppl. III): 10 (1997).[30]

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[30] Unfortunately, recent advances in HIV treatment have significant limitations. Many patients do not respond or cannot tolerate the medications and in any event it is not clear how long the drugs will work for anyone. The transformation of HIV to a chronic manageable disease is not on the horizon. *See* Steven G. Deeks, M.D., et al., *HIV-1 Protease Inhibitors: A Review for Clinicians*, 277 Journal of the American Medical Association No.2: 145 (1997) (noting that the new treatments have "significant adverse effects," that long-term efficacy has not been determined, in part due to the possibility that resistance will impede drug activity, and that the drugs are not effective in all patients).

In addition, regular, preventative health care, including dental care, is critical to maintaining health for people with HIV. J.A. 87, ¶ 4. Access to such care is made more difficult by well-documented discrimination against people with HIV.[31] This discrimination not only deters people with HIV from seeking care, but also deters patients from disclosing HIV status to providers of routine health care, such as dentists. Petitioner cannot argue that people with HIV, such as Ms. Abbott, should be denied routine health care (or be forced to travel four hours and pay an extra fee simply to have a cavity filled), but yet claim that they are not limited in any major life activity.[32] *See, e.g., Austin v. Pennsylvania Department of Corrections*, 876 F. Supp. at 1465 (HIV "by its biologic effects and the fear it inspires in others, clearly limits those infected in major life activities").

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[31] The President's Commission on the HIV Epidemic noted in its 1990 report to the President and Congress that "the number [of dentists willing to treat people with HIV] remains grossly inadequate and unacceptable. The difficulty, and in many cases inability, of obtaining dental services is . . . an all too common problem for people living with HIV infection and AIDS." *See* President's Commission on the HIV Epidemic, Annual Report to the President and Congress 163 (August 1990). *See also*, M. Elizabeth Bennett, Ph.D., et al., *A National Survey: Dentists' Attitudes Toward The Treatment of HIV-Positive Patients*, 126 Journal of the American Dental Association 509 (April, 1995); C. Lewis, M.D. & M.D. Montgomery, M.D., *Primary Care Physicians' Refusal to Care for Patients Infected with Human Immunodeficiency Virus*, 156 Western Journal of Medicine 36 (1992).

[32] While the limitation in this sense is not solely due to the physical effects of HIV, it remains true that the biology of the physical impairment creates the infectiousness of HIV and the increased need for medical care.

vi. The Text and Purpose of the ADA Demonstrate That Certain Impairments, Including HIV, are Always Disabilities.

While the ADA creates causes of action for individuals with disabilities, a careful examination of the "statute's full text, language, structure and subject matter,"[33] demonstrates that some impairments – such as quadriplegia, blindness, and HIV infection – have predictable consequences which are universally limiting.[34] When an impairment always limits substantially major life activities, nothing in the text requires the individual to provide particularized proof of the nature and extent to which the impairment substantially limits his or her major life activities. In such cases, the plaintiff should be found to have a disability upon establishing that he or she has an impairment that is universally limiting (e.g., permanent contagiousness, incurability, and fatality).

Indeed, the ADA's text frequently refers to a "class of individuals with disabilities," suggesting that there are

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[33] *See United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 454 (1993).

[34] Other impairments may not have universal consequences for each person with the impairment. In other words, some impairments have a wide range of possible consequences from *de minimis* to life-threatening. For example, allergies and arthritis are not substantially limiting for every person with either impairment. The breadth and flexibility of the definition of "disability" permits persons with those impairments to make an individualized showing of substantial limitation. This type of individualized approach is a way to broaden the statute, not narrow it. Petitioner's claim that this Court in *Arline* made an individualized determination of whether the plaintiff's tuberculosis was substantially limiting does not refute the principle that there are impairments which are always limiting. Tuberculosis, unlike HIV, is not terminal and is not permanently contagious.

some impairments which are always disabilities, and therefore can be identified and treated as a class. *See, e.g.*, 42 U.S.C. Section 12182(b)(2)(A)(a)(i); 42 U.S.C. Section 12112(b)(6).[35] Moreover, an insistence on particularized proof after the event of discrimination would lead to serious public health consequences and absurd results. The undisputed purpose of the ADA is to "provide a clear and comprehensive national mandate for the elimination of discrimination against people with disabilities." 42 U.S.C. Section 12101(b)(1); S. Rep. at 2. If a particularized assessment was always required, no one could ever know until after the fact whether an individual had a disability. A "clear and comprehensive mandate" would hardly exist.

Critically, Congress determined that coverage of all people with HIV under the ADA was critical to public health efforts to combat the spread of the epidemic. The House Report noted that:

> As long as discrimination occurs, and no strong national policy with rapid and effective remedies against discrimination is established, individuals who are infected with HIV will be reluctant to come forward for testing, counseling and care. This fear of potential discrimination . . . will undermine our efforts to contain

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[35] In the legislative history, Congress was explicit about the provisions of the ADA which required an individualized, case-by-case assessment. For example, Congress was explicit that the determination of reasonable accommodation is a "fact-specific case-by-case approach" and must be determined on "particular facts." *See* S. Rep. at 31. Similarly, Congress was explicit that the determination of "direct threat" "must be made on a case-by-case basis . . . [and] requires a fact-specific individualized inquiry . . . " S. Rep. at 27. Although each of the committee reports discusses the definition of "individual with a disability" in depth, none discuss the need for a particularized assessment of whether an individual has a "disability."

> the HIV epidemic and will leave HEV-infected (*sic*) individuals isolated and alone.

H Rep. – 2 at 31, *quoting* Report of the President's Commission on the Human Immunodeficiency Virus.[36] As then-Surgeon General C. Everett Koop testified to Congress, "[i]f counseling [about HIV prevention] and testing are to work most effectively, individuals must have confidence that they will be protected fully from HIV-related discrimination." *See Americans with Disabilities Act of 1989: Hearings Before the Senate Comm. on Labor and Human Resources*, 101st Cong. 367 (1989).[37] If the legality of discrimination depends upon an uncertain particularized inquiry, that confidence cannot exist.

Moreover, requiring a particularized assessment will often lead to absurd results.[38] For example, a dentist

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[36] *See also*, Statement of Senator Moynihan, 135 Cong. Rec. S10794 (Sept. 7, 1989) (citing the importance of ending discrimination, including for public health reasons, and noting that ADA covers "people with a diagnosis of HIV infection").

[37] These critical public health goals are as true today as at the time the ADA was enacted in 1990. *See* Steinbrook, M.D., n.3, *supra* (declaring that current public health strategies are "most likely to succeed as part of an overall strategy that incorporates protection against discrimination . . . [and noting that the] prejudices, fears and legacy of discrimination associated with the infection have deep roots in society"). Indeed, today with the danger that the virus will become drug resistant if patients do not follow strict regimens, it is particularly important that individuals not fear discrimination. *See* Brief of *Amicus Curiae* Elizabeth Glaser Pediatric AIDS Foundation, Section I.A. (discussing case of school child who avoided taking medications in class).

[38] *Amicus Curiae* American Dental Association points to cases requiring an individualized determination of disability. *See* Brief at 10-12. Because many impairments have a wide range of physiological effects, an individualized assessment is at times appropriate. *See, e.g., Homeyer v. Stanley Tulchin Associates, Inc.*,

would be able to discriminate against some people with HIV, but not others, even though there is no distinction between the infectiousness of the two groups. Indeed, who gets care and who is denied care could depend upon limitations to major life activities which might not even be known to a dentist and which would be irrelevant to the question whether dental care should be provided. If an individual could not be assured that discrimination would be prohibited, he or she might well be tempted to either forego care or hide the condition.[39]

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91 F.3d 959, 962 (7th Cir. 1996) (individualized inquiry necessary to determine whether allergy to smoke constitutes a disability); *Katz v. City Metal Co.*, 87 F.3d 26, 32 (1st Cir. 1996) (individualized inquiry necessary to determine whether cardiac condition is a disability). For the most part, courts have insisted upon an individualized inquiry in cases in which the plaintiff has cited the inability to perform a single job as the major life activity. *See, e.g., Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986); 29 C.F.R. Section 1630.2(j)(3)(i). However, to the extent that some lower courts have gone beyond the particular facts and conditions before them to suggest that a highly particularized showing of substantial limitation is required in every single case, they have added a requirement not present in the clear text of the statute, and contradicted by the structure and legislative history of the ADA, as well as the common practice under the Rehabilitation Act. *See, e.g., United States v. University Hospital*, 729 F.2d 144, 155 (2d Cir. 1984) (finding that infant has a handicap under the Rehabilitation Act because she will be mentally retarded, without requiring further analysis as to how that retardation will substantially limit her major life activities).

[39] Petitioner himself points to the absurdity of an individualized approach by arguing that he could not know the nature of Ms. Abbott's limitations. Petitioner's Brief at pp. 41-42. The petitioner does not, however, contend that people with HIV never have a disability. With a particularized

An individualized approach would make it particularly hard for children to establish disability under the first prong. Clearly, Congress could not have intended that the statute be interpreted in such a way that an HIV-positive school child could be barred from school merely because the child could not make an individualized showing as to how his or her own HIV substantially limited major life activities.[40] In short, demanding a particularized assessment would undermine the statute's anti-discrimination provisions, while creating uncertainty about legal obligations for both covered entities and employees or customers alike.

vii. The Legislative History and Agency Regulations Also Compel the Conclusion That All Persons with HIV are Covered Under the ADA.

The ADA's legislative history reinforces the clear intent of the statutory language that some impairments, such as HIV infection, are always disabilities. *See United States v. Clark*, 454 U.S. 555, 561 (1982) ("Although the language of the statute is clear, any lingering doubt as to its proper construction may be resolved by examining the legislative history . . . "). Congress repeatedly expressed a

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approach, he would always be in the same quandary. Indeed, petitioner could claim the right to refuse to treat a person with lung cancer because the patient had not proven that he or she was limited in major life activities.

[40] Indeed, the problem of HIV-positive children being barred from schools was common in the 1980s and formed the basis for many of the early cases holding that HIV was a disability. *See, e.g., Thomas v. Atascadero Unified School District*, 662 F. Supp. 376 (C.D. Cal. 1986); *Ray v. School District of DeSoto County*, 666 F. Supp. 1524 (M.D. Fla. 1987). Under petitioner's approach, many, if not most, of those cases would have been wrongly decided.

unanimous and unequivocal understanding in the legislative history that all individuals with HIV are covered under the ADA's definition of "disability." That conclusion is not based on a few stray floor statements, but is clearly repeated in many committee reports, innumerable floor statements and was even clearly understood by those who challenged the wisdom of the legislation.

The official House Report to the ADA in a section titled "Explanation of the Legislation – Definition of the Term Disability" states:

> [A] person who is a paraplegic will have a substantial difficulty in the major life activity of walking; a deaf person will have a substantial difficulty in hearing aural communications; and a person with lung disease will have a substantial limitation in the major life activity of breathing. As noted by the U.S. Department of Justice . . . a person infected with the Human Immunodeficiency Virus is covered under the first prong of the definition of the term "disability" because of a substantial limitation to procreation and intimate sexual relationships.[41]

In addition, committee reports specifically refer to persons with HIV infection in describing the discrimination prohibited by both Titles I and III of the ADA. *See* S. Rep. at 34 ("[I]t would be unlawful [under Title I] to transfer unilaterally a person with *HIV infection* from a job as a

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[41] *See* H. Rep – 2 at 52. *See also*, S. Rep. at 22; H. Rep. – 3 at 28 n.18 (reaching the identical conclusion). The House Report expressly adopted a 1988 official legal memorandum of the Department of Justice which concluded that asymptomatic HIV was a disability under the Rehabilitation Act. The Department of Justice based this conclusion in part on the substantial limitation to the major life activities of procreation and intimate sexual relations. *See* DOJ Memorandum, n.9, *supra*, attached as Exhibit E to the United States' Motion For Summary Judgment, Docket No. 52, September 19, 1995.

teacher to a job where such person has no contact with people.") (emphasis added); S. Rep. at 63 (stating that drug rehabilitation clinic could "not refuse to treat a person who was a drug addict simply because the patient tests positive for HIV"). *See also,* H. Rep. – 2 at 65, 106 (same).[42]

There is no ambiguity or disagreement in the legislative history about whether the ADA covers all people with HIV infection. Even legislators who opposed some aspects of the ADA understood and *assumed* that the act would apply to all persons with HIV.[43]

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[42] *See also,* Statement of Representative McDermott, 136 Cong. Rec. H2626 (May 22, 1990) (HIV-positive individuals are "covered under the first prong of the definition of disability in the ADA . . . As a physician, I know that although the major life activity that is affected at any point along the spectrum by the HIV infection may be different, an effect on some major life activity exists from the time of HIV infection").

[43] *See, e.g.,* H. Rep. – 3 at 92-93, Dissenting Views of Honorable Chuck Douglas ("as presently drafted, a food service operator could not even *transfer* an employee with AIDS, or one who has tested positive for the AIDS virus out of a food-handling position . . . The reasons the employer could not are . . . [that] the person *does not* pose a direct threat to the health and safety of other workers and patrons") (emphasis in original).

In addition, there was an extended debate about an amendment to exempt food-handling employees who were diagnosed with an infectious or contagious disease such as HIV. The amendment was defeated, but the debate makes clear that the legislators unanimously understood that the definition of disability covered all persons with HIV, not just those with symptoms. *See* 136 Cong. Rec. 2478, 2483 (May 17, 1990); (Statements of Representatives Chapman, Engel and Pelosi); *id.* at S7436 (June 6, 1990) (Sen. Helms); *id.* at S7438 (Sen. Harkin); *id.* at S7443-46 (Sens. Kennedy, Cranston & Durenberger); *id.* at H4612 (July 12, 1990) (Rep. Dannemeyer); *id.* at H4628 (Rep.

In addition, Congress expressly authorized the Attorney General to issue regulations implementing Title III. *See* 42 U.S.C. Section 12186(b). The Preamble to these regulations cites and adopts the 1988 DOJ Memorandum which concludes that people with asymptomatic HIV are covered under the Rehabilitation Act, because HIV substantially limits the major life activities of procreation and intimate sexual relations. *See* 28 C.F.R. Part 36, App. B Section 36.104. The Equal Employment Opportunity Commission has taken the same position under Title I of the ADA. *See* EEOC, *Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act*, at T-II (January 1992) ("Some impairments, such as blindness, deafness, HIV infection or AIDS, are by their nature substantially limiting").

viii. The Legal History of Federal Disability Discrimination Laws Demonstrates That HIV Infection is Always a "Disability" Under the ADA.

The conclusion that HIV is always a disability is further supported by the fact that prior to 1990 the term "individual with a handicap" had been clearly established under federal disability discrimination laws to include all people with HIV. Prior to the passage of the ADA, every reported decision under the Rehabilitation Act and the Fair Housing Act had determined that asymptomatic HIV constituted a disability. *See Doe v. Garrett*, 903 F.2d at 1459 ("[W]e note that it is well established that infection with AIDS constitutes a handicap for purposes of the [Rehabilitation Act]"); *Cain v. Hyatt*, 734

Hoyer quoting Pres. Bush). *See also,* dialogue between Senators Harkin and Helms (135 Cong. Rec. S10765-10768) in which Senator Helms expressed his clear understanding that the ADA covered all HIV-positive persons.

F. Supp. at 679 (even when asymptomatic, "HIV infection constitutes a substantial physical limitation upon major life activities"); *Baxter v. City of Belleville*, 720 F. Supp. at 725-728 (finding that HIV-positive persons are covered under the Fair Housing Act because they are infectious from first day of contracting disease and immunological deterioration begins on first day of becoming infected; and finding that the inability to reside in group residence due to public misapprehension about HIV adversely affects major life activities); *Thomas v. Atascadero Unified School District*, 662 F. Supp. at 379 ("People infected with the AIDS virus suffer significant impairments of their major life activities . . . Even those who are asymptomatic have abnormalities in their hemic and reproductive systems making procreation and childbirth dangerous to themselves and others").

When Congress adopts a new law incorporating sections of prior law, Congress is presumed to be aware of prior judicial interpretations and adopt them in the new statute. *Lorillard v. Pons*, 434 U.S. at 580-581. *See also, Keene Corp. v. United States*, 508 U.S. 200, 212-213 (1993) (presumption that Congress is aware of and adopts earlier judicial interpretations); *Pierce v. Underwood*, 487 U.S. 552 (1988) (Where Congress re-enacts a statute that had in fact been given a consistent judicial interpretation, along the lines the committee reports suggest, such re-enactment generally includes the settled judicial interpretation). Such a presumption is especially warranted here because Congress expressly directed that the ADA shall be interpreted consistently with such prior legal history. *See* 42 U.S.C. Section 12201(a).[44]

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[44] The prior legal history also includes Congress' understanding of the Fair Housing Amendments Act of 1988. *See, supra,* at Argument Section I.A., p. 9. In addition, Congress amended the Rehabilitation Act in the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), codified at 29 U.S.C. Section 706(8)(D), to codify the "direct threat" standard in *Arline*. *See* 134 Cong. Rec. 2924 (March 2, 1988), Statement of Representative Coehlo: "People with contagious diseases and infections such as people with AIDS or people infected with the AIDS virus can be subject to intense and irrational discrimination. I am pleased that this amendment makes clear that such individuals are covered under the protections of the Rehabilitation Act." *Id.* at 2937, Statement of Representative Weiss: "[I]ndividuals who are suffering from a contagious infection – such as carriers of the AIDS virus . . . are also individuals with handicaps under the [Rehabilitation Act]."

ix. Even If HIV is Not Always a Disability, The Court of Appeals Correctly Ruled In This Case That Sidney Abbott is Substantially Limited in the Major Life Activity of Reproduction.

Due to her HIV infection, Ms. Abbott is an individual with a disability under the ADA. Because petitioner disputed her disability, Ms. Abbott chose to make an individualized showing in the record that her HIV substantially limited her major life activity of procreation. This Court did not grant certiorari on the Court of Appeals' ruling that Ms. Abbott demonstrated a substantial limitation to procreation. *See* 107 F.3d at 942 (14a-15a). Therefore, if this Court agrees that procreation is a major life activity, it necessarily follows that Ms. Abbott has a disability within the meaning of the ADA.

C. EVEN IF ALL PEOPLE WITH HIV ARE NOT PROTECTED UNDER THE FIRST PRONG OF THE DEFINITION OF DISABILITY, MS. ABBOTT, AS A PERSON DENIED SERVICES BECAUSE OF A COVERED ENTITY'S FEAR OF HER CONTAGION, IS COVERED UNDER THE THIRD PRONG.

The third prong of the ADA's definition of disability covers individuals who are "regarded as having such an

impairment." 42 U.S.C. Section 12102(2). This definition is satisfied where, as here, an individual is denied services solely because of a covered entity's fears about her impairment. *See Arline*, 480 U.S. at 280, 282-283 (substantial limitation based on negative attitudes of others); *see also*, 28 C.F.R. Section 36.104 (same).

Congress added the "regarded as" prong in 1974 to address discrimination due to stereotypical attitudes and ignorance of impairments. *See* p. 8, *supra*. In *Arline*, this Court addressed the scope of this prong in the context of, as in this case, a covered entity's concerns about contagiousness. The Court adopted as an alternative holding that a schoolteacher with tuberculosis was "regarded as" having "such" an impairment when she was fired due to her contagiousness. 480 U.S. at 282-284. The Court declared that "the basic purpose of Section 504 . . . is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." 480 U.S. at 284. The Court recognized that contagious conditions are almost always accompanied by social stigma. *See* 480 U.S. at 284 ("[f]ew aspects of handicap give rise to the same level of public fear and misapprehension as contagiousness."). The Court specifically observed that the inclusion of "cosmetic disfigurement" in the regulation's definition of "impairment" supported the conclusion that the statute covers limitations caused by stereotypical attitudes about an impairment. 480 U.S. at 283 n.10. "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." *Id.* at 283.

The House and Senate Committee Reports on the ADA expressly adopted *Arline*'s analysis of the "regarded as" test. *See* H. Rep – 2 at 53; H. Rep. – 3 at 30; S. Rep. at 23-24. The principle of stare decisis carries particular weight where Congress explicitly endorses the reasoning

of a case. *See Neal v. United States*, 516 U.S. 284, 295 (1996) (noting that this Court gives "great weight to stare decisis in the area of statutory construction . . . [because] 'Congress is free to change this Court's interpretation of its legislation' ") (*quoting Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977)).

In addition, the Committee reports adopted the regulatory definition of "regarded as" under the Rehabilitation Act. Under these regulations, a person is regarded as having an impairment if he or she:

> (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by the [covered entity] as constituting such a limitation;
>
> (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
>
> (C) [does not have an impairment but] is treated by the [covered entity] as having such impairment.

See H. Rep. – 3 at 29, citing 45 C.F.R. Section 84.3(j)(2)(iv); H. Rep. – 2 at 53; S. Rep. at 23.

The legislative history to the ADA makes clear that a person is protected under the "regarded as" prong of the definition of disability if he or she is excluded from any "basic life activity, or is otherwise discriminated against, because of a covered entity's negative attitudes towards that person's impairment . . . " H. Rep. – 2 at 53. The House Judiciary Committee Report emphasized that there are a variety of "myths, fears and stereotypes associated with disabilities" and "attitudinal barriers" which result in discriminatory treatment of persons with impairments. H. Rep. – 3 at 30. These include "concerns regarding productivity, safety, insurance, liability, attendance . . . and acceptance by co-workers and customers." *Id.*

The Senate Report noted that the "regarded as" prong is "particularly important" for persons with "stigmatic" conditions, such as a person with severe burns. S. Rep. at 24. This makes clear that the "regarded as" prong is intended to prohibit discrimination against persons who have impairments which invoke fear and discomfort in others.

The "regarded as" prong is particularly applicable to people with HIV, symptomatic or asymptomatic. The Department of Justice Title III regulation adopts the same definition of "regarded as" as the committee reports and Rehabilitation Act regulations, including when an individual has a "physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others towards such impairment." 28 C.F.R. Section 36.104(4).

HIV is the quintessential stigmatic condition which has engendered fear of contagion, particularly with regard to medical or dental services. *See* n.31, *supra*. As the American Medical Association has noted, "[a]n HIV-seropositive individual . . . may be subject to many and varied discriminations – by family and loved ones, neighbors and friends, employers and fellow employees, and other providers and services."[45] *See also*, New England Journal of Medicine, n.3, *supra*.

Numerous courts have recognized the deeply rooted stigma associated with HIV. *See Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (noting that disclosure of HIV status could subject an individual to social ostracism and discrimination in employment, insurance and health care); *Severino v. North Fort Myers Fire Control District*, 935 F.2d 1179, 1182 n.4 (11th Cir. 1991) (finding that HIV-

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[45] *See* American Medical Association, Board of Trustees Report, Prevention and Control of Acquired Immunodeficiency Syndrome: An Interim Report, 258 Journal of the American Medical Association No. 15, October 16, 1987, 2097, 2098.

positive firefighter was "regarded as" handicapped and noting that the "contagiousness of the disease brings AIDS within the definition of handicap"); *Support Ministries v. Village of Waterford, N.Y.*, 808 F. Supp. at 132 ("individuals with asymptomatic HIV were substantially limited in major life activities due to the prejudice and apprehension AIDS engenders on a social level"); *Cain v. Hyatt*, 734 F. Supp. at 680 ("[t]he pervasive anxiety that AIDS is easily transmitted converges with and often ostensibly justifies the disapprobation of AIDS victims").[46]

It is undisputed that Ms. Abbott was denied services in a place of public accommodation due solely to fears of contagion. As a result, Ms. Abbott is a person who is "regarded as" having a physical impairment and therefore, is for this additional, alternative reason, a person with a disability under the statute.

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[46] Some courts have held that "regarded as" applies when a covered entity erroneously believed that an individual had an impairment which substantially limits major life activities. *See, e.g., Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1996). These cases, however, have been decided under the third section of the regulatory definition of "regarded as," which focuses on a covered entity's misperception that an individual had an impairment which was substantially limiting. *See Aucutt*, 85 F.3d at 1319 (noting that there is no evidence that the employer "perceived or treated" employee as having a substantially limiting impairment). These decisions have not involved stigmatic conditions such as HIV, which are covered under the second section of the regulatory definition, referring to impairments that, in fact, substantially limit major life activities as a result of the attitudes of others toward the impairment. *See* 28 C.F.R. Section 36.104; 29 C.F.R. Section 1630.2(1)(2).

II. COURTS SHOULD DEFER TO PUBLIC HEALTH AUTHORITIES – NOT NON-SPECIALISTS, SUCH AS A GENERAL DENTIST – TO DETERMINE WHETHER THE RISK OF TRANSMISSION OF AN INFECTIOUS DISEASE JUSTIFIES DISCRIMINATION AGAINST A PATIENT.

A. The *Arline* Decision, the ADA's Legislative History, and Agency Regulations Require That the Determination of "Direct Threat" be Made With Deference to Public Health Authorities, Not to Public Accommodations.

Although the American Dental Association insists that patients with HIV may be safely treated in a private dental office, petitioner argued below that such treatment would pose a "direct threat to the health or safety of others." 42 U.S.C. Section 12182(b)(3). In making this argument, petitioner contends that the Court should defer to his own personal beliefs as long as they are "reasonable." Petitioner's Brief at 15.[47] Petitioner's position contravenes this Court's opinion in *Arline*, as well as the ADA legislative history and Title III Regulations.

In *Arline*, this Court established an objective test to determine whether discrimination is justified by a "direct threat" defense.[48] The Court stated twice for emphasis

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[47] Petitioner claims that he should not be liable if he acted in "good faith." Petitioner's Brief at 15. Petitioner confuses whether he should be liable as a matter of tort law with whether he should be enjoined from violating a federal anti-discrimination statute.

[48] This Court instructed trial courts to make findings of fact "based on reasonable medical judgment given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long the carrier is infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the

that in making this determination, "courts normally should defer to the reasonable medical judgments of public health officials." 480 U.S. at 288; *see also*, 480 U.S. at 286 n.15;[49] *American Dental Ass'n v. Martin*, 984 F.2d 823, 828 (7th Cir. 1992) ("judgments of the [United States Centers for Disease Control and Prevention[50]] are entitled to respect"), *cert. denied*, 510 U.S. 859 (1993); *id.* at 832 (Coffey, J., concurring) (the CDC is medically and scientifically qualified to determine and evaluate if there is in fact a significant risk in the health care arena); *Chalk v. United States District Court*, 840 F.2d 701, 706-708 (9th Cir. 1988) (noting that *Arline* "admonishes" courts to defer to public health officials and crediting the position of the CDC, Surgeon General and American Medical Association).

In codifying the "direct threat" defense into the ADA, Congress expressly adopted the full *Arline* test. *See* H. Rep. – 3 at 34, 45 ("the Committee intends to codify the 'direct threat' standard used by the Supreme Court [in *Arline*]"; the "risk of transmitting the infection to others must be determined based on objective and accepted public health guidelines."); H. Rep. – 2 at 76 ("the term 'direct threat' is meant to connote the full standard set forth in *Arline*"); S. Rep. at 27.

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disease will be transmitted and will cause varying degrees of harm." 480 U.S. at 288.

[49] Petitioner's "direct threat" defense focuses exclusively on fears about his own safety, not the best interests of the patient. This case therefore does not present the question how a court should weigh a physician's judgment about the most appropriate medical treatment or care for the patient.

[50] The Centers for Disease Control and Prevention (CDC) is a federal agency which is the preeminent public health authority in the United States. Its mission is to investigate and monitor health problems and develop sound policies and strategies for the prevention and control of diseases. J.A. 103.

The Department of Justice Title III regulation similarly codifies *Arline*. 28 C.F.R. Section 36.208; 28 C.F.R. part 36, App. B Section 36.208. In the Appendix to these Regulations, the Department of Justice explains that the test is an objective one and that the Department expressly rejected proposals to permit a public accommodation to exercise its own judgment to determine a "direct threat." 28 C.F.R. part 36, App. B Section 36.208. These regulations are controlling unless they can be shown to be arbitrary, capricious or contrary to the statute which petitioner has not demonstrated. *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845 (1984); *Equal Employment Opportunity Commission v. Commercial Office Products Company*, 486 U.S. 107, 124 (1988) (O'Connor, J., concurring).[51]

B. Deference to Public Health Authorities is Essential to Achieve the Statute's Goals of Protecting the Public Health While Eradicating Unwarranted Discrimination.

In enacting the ADA, Congress was not unmindful that in certain situations contagious diseases could pose a health risk to others. At the same time, Congress understood that contagious diseases have historically been subject to myths, fears and stereotypes. *See Arline*, 480 U.S. at

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[51] The regulations add that a direct threat is "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies. . . . " 28 C.F.R. Section 36.208. Courts applying the "direct threat" defense under Title III have followed the regulations and shown deference to public health authorities. *See, e.g., United States v. Morvant*, 898 F. Supp. at 1166-1167 (rejecting "direct threat" argument and noting "plethora of expert testimony" including from the CDC that its guidelines significantly mitigate any risk). In no case concerning a contagious disease has a court ever deferred to a defendant's personal beliefs.

284 & n.12 (noting the "complex and often pernicious mythologies about . . . the transmission of illness . . . "; "[f]ew aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness.").[52] The "direct threat" test aims to "protect[ ] handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns . . . as avoiding exposing others to significant health and safety risks." *Arline*, 480 U.S. at 287.

Deference to public accommodations, including health care providers, would destroy this balance because health care providers are as susceptible as anyone else to the fears and stereotypes which accompany contagious diseases. *See* n.31, *supra*. Indeed, the statute explicitly includes the offices of health care providers in the list of public accommodations. *See* 42 U.S.C. Section 12181(7)(F). Congress must have believed that health care providers could engage in unwarranted discrimination against patients. In addition, health care providers are not held to a different standard with respect to "direct threat" than any other place of public accommodation, such as a hotel, restaurant, grocery store, or day care center.

Moreover, assessing the risk of transmission of infectious diseases requires expertise in epidemiology and microbiology beyond the scope of public accommodations, including health care providers. In particular, petitioner, a general dentist, does not have medical training or expertise in the transmission of infectious diseases

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[52] *See also*, H. Rep. – 3 at 45 ("person with disability must not be excluded . . . based on stereotypes or fear . . . [or] speculation about the risk or harm to others"); S. Rep. at 27 ("direct threat" cannot be based on a "speculative or remote risk").

such as HIV.[53] Petitioner has not had any formal dental or medical training since his graduation from dental school in 1978, when infection control was not a "specific topic at that time." Motion, p. 2 and n.2.[54] He testified under oath that he is not an expert in the epidemiology or modes of transmission of HIV (Motion, p. 4) and has never had any training in microbiology, epidemiology, virology or infectious diseases. Motion, pp. 2-4. Sanford Kuvin, M.D., petitioner's sole expert in this case, testified that he does not believe that petitioner is an expert on infection control.[55] Petitioner specifically represented to the trial court that he was not an expert on infectious diseases for purposes of summary judgment in this case. J.A. 261. Petitioner may have special knowledge about filling a cavity, but he has no specialized knowledge about the relevant issue in this case: the risk of HIV transmission.

C. Petitioner's Argument That Courts Should Defer to Him Misconstrues the Clear Legal Precedent and the ADA's Statutory Goals.

In arguing that the lower court should have deferred to his own good faith and subjective assessment of

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[53] *See* Plaintiff's Memorandum in Support of Motion to Exclude Expert Report and Testimony of Randon Bragdon, D.M.D, District Court Docket No. 61, dated September 19, 1995 (hereinafter, the "Motion"), and Reply Memorandum, District Court Docket No. 87.

[54] Petitioner states that he has taken numerous continuing education courses relating to HIV and infection control. He did not provide any evidence that any of these general courses for nonexperts stated that it is unsafe to provide routine dental care to patients with HIV in a private dental office.

[55] *See* Deposition of Sanford Kuvin, M.D. (p. 223), District Court Docket No. 58.

"direct threat" (*see* Brief at 15),[56] petitioner ignores the clear language of the regulations, as well as the legislative history and this Court's opinion in *Arline*. Petitioner quotes *Arline* out of context as stating that it "does not address whether courts should defer to reasonable medical judgments of private physicians." Petitioner's Brief at 44. *Arline* actually states that it does not address "whether courts should also defer to the reasonable medical judgments of private physicians *on which an employer has relied*." 480 U.S. at 288 n.18 (emphasis supplied). *Arline* does not contemplate that a lower court would ever defer to the judgment of the defendant. This case does not raise the issue which *Arline* left open. It is undisputed that at the time Dr. Bragdon refused to fill Sidney Abbott's cavity, he did not consult or seek guidance from anyone.

Petitioner also quotes out of context one sentence of the Senate Committee report that "nothing in this legislation is intended to prohibit a physician from providing the most appropriate medical treatment in the physician's judgment." Petition at 43. The prior sentences state:

> . . . A physician who specializes in treating burn victims could not refuse to treat the burns of a deaf person because of his or her deafness. However, such a physician need not treat the deaf individual if he or she does not have burns nor need the physician provide other types of

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[56] Petitioner's position on the third question presented is completely circular. He frames the issue as whether courts should defer to his judgment *as long as* it is reasonable in light of then-current medical knowledge. This begs the question: How should a court determine what is reasonable in light of current medical knowledge? *Arline*, the ADA's legislative history and the agency regulations direct courts to public health authorities.

> medical treatment to individuals with disabilities unless he or she provides other types of medical treatment to nondisabled individuals.

S. Rep. at 62-63. This clarifies that physicians are not required to provide treatment outside their scope of services or specialization. In this case, however, petitioner acknowledged that he regularly fills cavities and was competent to fill Ms. Abbott's cavity.[57] Petitioner's sole reason for refusing to treat Ms. Abbott was his fears about his own safety, not concerns about appropriate treatment for the patient.[58]

Finally, petitioner cites cases which concern the limits on state authority under the Fourteenth Amendment. These cases say nothing about how a federal statute should be interpreted. For example, in *Youngberg v. Romeo*, 457 U.S. 307 (1982), this Court addressed the Constitutional limitations on the state, acting in *parens patriae*, when confining a person involuntarily committed to an institution for the retarded. The deference to the judgments of professionals at the institution was based in part on the interest in minimizing judicial interference with the operations of state institutions. *See* 457 U.S. at 320-323.[59] If anything, this case supports deference to

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[57] *See* Deposition of Randon Bragdon, D.M.D., District Court Docket No. 58, pp. 272-273 (acknowledging that if Ms. Abbott had not indicated that she was HIV-positive, petitioner would have filled her cavity in his office).

[58] It is undisputed that Ms. Abbott required a filling and that petitioner did not deny her treatment on any grounds related to her dental or medical needs. Thus, the issue before the Court is not whether any deference is appropriate to health care providers when they are assessing what treatments are appropriate for patients.

[59] The Court in *Youngberg* also ruled that decisions about patient care must be made by a professional who is "competent, whether by education, training or experience, to make the

public health authorities, not deference to the judgments of individual providers.

Ultimately, by citing these due process cases and seeking "space for civil liberty among dentists" (Petitioner's Brief at 50), petitioner is arguing that the ADA incorrectly prohibits him from discriminating where he believes he should be free to do so.[60] It goes without saying that it is the Court's task to interpret the statute, "not to second-guess the wisdom of the congressional policy choice." *Mansell v. Mansell*, 490 U.S. 581, 594 (1989).

Even if this Court were to grant deference to the beliefs of individual health care providers, there is no basis to disturb the Court of Appeals' affirmance of summary judgment in favor of Ms. Abbott. Both the District Court and the Court of Appeals scrutinized the voluminous evidence presented by petitioner in support of his "direct threat" defense and found it to be nothing more than "conjecture," "speculation" and "tangential statistics." 980 F. Supp. at 588-589 (43a-47a); 107 F.3d at 946-948 (24a-30a).

CONCLUSION

The Court of Appeals correctly found that Ms. Abbott is an individual with a disability and that petitioner unlawfully discriminated against her. If it is uncertain whether an individual with HIV has a disability, or if public accommodations can rely on their own fears and

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particular decision at issue." *Id.* at 323 n.30. Public accommodations, such as petitioner in particular, do not have the training, experience or education to assess the risk of transmission of infectious diseases.

[60] The district court rejected petitioner's challenge to the constitutionality of the ADA. *See* 912 F. Supp. at 592-595 (54a-62a). Petitioner did not appeal that ruling.

conjecture to discriminate, then any hospital could lawfully refuse to draw blood or insert an intravenous line in any patient with HIV. The result would be a medical disaster for the almost one million people in this country living with HIV and a public health disaster for society in general.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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